Valley Special Needs Program, Inc. t/a Valley Community Services *and* Service Employees International Union, Local 585, AFL–CIO. Cases 6–CA–24051 and 6–CA–24246

August 29, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On December 16, 1993, Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The Respondent and General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings as modified,[1] and conclusions as modified[2] and to adopt the recommended Order as modified.

1. The General Counsel excepts to the judge's finding that the Respondent did not violate Section 8(a)(1) of the Act by soliciting grievances and making promises of benefits in order to undermine support for the Union. We find merit to the exception.

The record shows that the Respondent learned of its employees' union activities on an unspecified date in June 1991. On September 26, 1991, the Union demanded recognition and also filed a petition for an election. On November 1, 1991, the petition was withdrawn.

According to Executive Director Celeste Emrick, she and other managers met with employees at two houses from August to mid-October 1991, in biweekly meetings.[3] At the first meeting, Emrick apologized for the problems the Respondent was experiencing in providing bonus money and meeting the payroll in August. Emrick reminded employees that the Respondent had experienced similar payroll problems in the previous year. After explaining where the Respondent's funding came from, she expressed appreciation for the employees' work, asked for questions, asked what problems the employees were having with delayed paychecks, and asked for suggestions of ways to cut costs and raise funds. Employee Cheryl Smith and other employees brought up complaints such as the disparate treatment in the assignment of overtime, and Emrick promised to look into them. At the end of the meeting, Emrick said she would update them on the things that were discussed.

Emrick conducted subsequent meetings in similar fashion and gave the employees progress reports on the topics previously discussed. At one meeting, Emrick asked employees about their problems with health insurance and delayed payments. Emrick asked whether anyone needed any type of individual assistance until they received their paychecks, such as assistance in calling mortgage companies and landlords. At another meeting, she asked if employee complaints had been resolved. Employee Ruth King stated that her complaint about patients being allowed to attend church had been addressed. Employee Linda Christner asked about insurance claims, and Emrick said the Respondent was taking care of them. At one meeting, Emrick told employees that the payroll would be met. At the end of each meeting, Emrick asked the employees if they wanted to meet again.

The judge credited Emrick's claim that the meetings were called to discuss serious economic problems and found that the problems discussed were related to or incidental to her questions about delayed paychecks. The judge concluded that Emrick's conduct did not violate the Act.

We disagree with the judge. It is well settled that when an employer, who has not previously had a practice of soliciting employee grievances or complaints, suddenly embarks on such a course during an organizational campaign, the Board may find that the employer is implicitly promising to correct those inequi-

[1] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. III,C,10,f, the judge attributes the threat that ''things would get rougher'' to Supervisor McClain. We note that Supervisor Surrena made the threat.

In adopting the judge's finding that the Respondent engaged in unlawful interrogation of employees, Chairman Gould and Member Browning find it unnecessary to rely on *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

In adopting the judge's finding that the Respondent unlawfully imposed an overly broad and discriminatory restriction on union activities and discussions on company property, Chairman Gould and Member Browning find it unnecessary to rely on *Our Way, Inc.*, 268 NLRB 394, 395 (1983).

[2] The General Counsel has excepted to the judge's failure to find meritorious certain of the complaint allegations that the Respondent interrogated employees, indicated that selecting a union would be futile, created the impression of surveillance, solicited grievances, and promised benefits in violation of Sec. 8(a)(1). Without addressing all the General Counsel's 8(a)(1) exceptions, we have elsewhere in this decision reversed the judge and found that the Respondent engaged in soliciting grievances, promising benefits, and creating the impression of surveillance in violation of Sec. 8(a)(1). We find it unnecessary to pass on the remainder of the General Counsel's 8(a)(1) exceptions because finding the additional violations he seeks would be cumulative and would not affect the Order.

[3] The record indicates that representatives from the Mount Pleasant, Ruffsdale, and Belle Vernon houses were present.

ties discovered as a result of the inquiries, thereby leading employees to believe that the combined program of inquiry and correction will make collective action unnecessary. See *Reliance Electric Corp.*, 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972).

We find that Emrick, the Respondent's top official, at meetings coinciding with the rise and fall of the Union's organizing campaign, elicited questions and complaints from the employees, promised to look into some complaints (such as the discriminatory assignment of overtime), and promised that fiscal problems were being attacked and that insurance concerns would be redressed.[4]

The Respondent does not contend, nor does the record establish, that the Respondent had a previous practice of holding such meetings and soliciting grievances, even though the claimed focus for the meetings—the Respondent's difficulty in meeting its payroll—had also occurred during the prior year. In fact, Emrick admitted that she normally did not speak to employees directly and that she held the meetings because employees had complained about not receiving an adequate response to their complaints by lower level management.

We therefore find, based on Emrick's testimony, that Emrick unlawfully solicited grievances and promised benefits to employees in order to undermine the employees' support for the Union. *Ring Can Corp.*, 303 NLRB 353 (1991); *Blue Grass Industries*, 287 NLRB 274 (1987).

2. The General Counsel excepts to the judge's failure to find that the Respondent engaged in conduct creating the impression of surveillance in violation of Section 8(a)(1) of the Act. We find merit to the exception.

In mid-August, Michael Sauritch, a program assistant at the Belle Vernon house, volunteered to Program Manager Curt McClain that he had attended a recent union meeting. About 2 weeks later, McClain told Sauritch that ''McCarthy [East Operations Director Michael McCarthy] had been down here today and he was asking around to see who was the head of the Union at the Belle Vernon house'' and that McCarthy mentioned a few names, including employees Sherri Zelmore and Lois Sauritch (Michael Sauritch's mother). McClain made a similar statement in early August to Lois Sauritch. Finally, McClain in late August initiated a discussion with employee Patrick Sauritch about the Union, telling him that he knew about a union meeting and that McCarthy was trying to find out who was backing the Union.

The judge did not specifically address the General Counsel's contention that McClain's statements to the Sauritches created an unlawful impression of surveillance. We find that McClain communicated to employees that the Respondent, through its director, was attempting to ascertain the identities of union supporters and that certain individuals had already been identified. We find that such statements reasonably would lead the employees to believe that their activities were under surveillance. Accordingly, we find that McClain's statements violated Section 8(a)(1) of the Act. *Matheson Fast Freight*, 297 NLRB 63, 68 (1989).

3. The General Counsel also excepts to the judge's failure to issue a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). We find no merit to the exception.

In agreeing with the judge that a bargaining order is unwarranted,[5] we particularly rely on the judge's finding that the unfair labor practices ''directly reached but a small percentage of the nearly 140 unit employees in but a few of the Respondent's widely-spread facilities.''[6] We recognize that we have found merit in some 8(a)(1) complaint allegations that the judge recommended be dismissed, and we have found it unnecessary to pass on whether certain additional 8(a)(1) violations were committed. Based on our review of the record, however, we believe that even if all the 8(a)(1) violations the General Counsel seeks were here found, the number of facilities involved and the percentage of the unit affected by the unfair labor practices would not increase in any significant manner.[7] We therefore find that even if we granted the General Counsel's 8(a)(1) exceptions, a bargaining order would be unwarranted.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, Valley Special Needs Program, Inc. t/a Valley Community Services, Mount Pleasant, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Interrogating its employees concerning their union activities, sympathies, and desires; threatening

[4] The judge appears to assume that the Respondent's actions cannot constitute unlawful solicitations because they occurred during discussions of serious economic problems. The judge does not cite any precedent for such a rule, and we know of none.

[5] We disavow the judge's discussion of the bargaining order issue to the extent he suggests that the number of the General Counsel's witnesses testifying at the hearing in support of some of the unfair labor practices is a significant factor in determining the appropriateness of a bargaining order.

[6] Contrary to the General Counsel's contention, the record does not support a finding that the violations committed were widely disseminated among the unit employees.

[7] Given our basis for concluding that a bargaining order is not appropriate, we find it unnecessary to pass on the judge's discussion of unit scope and majority status issues.

its employees with closure of its facilities and/or with declaration of bankruptcy, discharge and other unspecified reprisals because of their union activities and sympathies; imposing overly broad and discriminatory restrictions on union activities and discussions on company property; telling employees that it would be futile to select Service Employees International Union, Local 585, AFL–CIO, as their bargaining representative; soliciting grievances and promising benefits for the purpose of undermining support for the Union; and creating the impression that the union activities of employees are under surveillance.''

2. Substitute the following for paragraph 2(b) and delete (b) at the beginning of last paragraph.

''(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you concerning your union activities, sympathies, and desires.

WE WILL NOT threaten you with closure of our facilities and/or with declaration of bankruptcy, discharge, and other unspecified reprisals because of your union activities and sympathies.

WE WILL NOT impose overly broad and discriminatory restrictions on union activities and discussions on company property.

WE WILL NOT tell you that it would be futile to select Service Employees International Union, Local 585, AFL–CIO, as your bargaining representative.

WE WILL NOT solicit grievances and promise benefits for the purpose of undermining support for the Union.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT in any like or related manner interfere with, coerce, or restrain you in the exercise of rights guaranteed by Section 7 of the Act.

VALLEY SPECIAL NEEDS PROGRAM, INC.
T/A VALLEY COMMUNITY SERVICES

Barton A. Meyers and *Dalia Belinkoff, Esqs.*, for the General Counsel.

Donald J. Andrykovitch, Esq. (Cohen & Grisby), of Pittsburgh, Pennsylvania, for the Respondent.

John Haer, Staff Director, and *Linda Wambaugh*, Organizing Director, of Pittsburgh, Pennsylvania, for the Union.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. This case was heard in Pittsburgh, Pennsylvania, during 10 days between June 17 and August 13, 1992, on a complaint issued pursuant to charges filed by Service Employees International Union, Local 585, AFL–CIO (the Union or Local 535).[1] The complaint alleges that Valley Special Needs Program, Inc. t/a Valley Community Services (the Respondent, the Company, or VCS), violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). A bargaining order is among the remedies sought. The Respondent's timely filed answer denies the commission of unfair labor practices and the propriety of a bargaining order remedy.

The parties were given full opportunity to participate, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, filed by the General Counsel and the Respondent, have been carefully considered.

On the entire record, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Pennsylvania not-for-profit corporation providing residential and educational day care for mentally handicapped adults and children at its facilities in the Pennsylvania counties of Allegheny, Westmoreland, Butler, and Somerset. In the course and conduct of its business operations during the 12-month period ending October 31, 1991, the Respondent had gross revenues in excess of $250,000 and performed services valued in excess of $50,000 for the Commonwealth of Pennsylvania.

The complaint alleges, the answer admits, and I find that the Respondent is an employer directly involved in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The relevant docket entries are as follows: The charge in Case 6–CA–20451 was filed on November 8, 1991, and the charge in Case 6–CA–24246 was filed on January 30, 1992. The complaint in Case 6–CA–20451 was issued on January 31, 1992, and was amended and consolidated with the complaint in Case 6–CA–24246 on April 20, 1992.

II. THE LABOR ORGANIZATION INVOLVED

Local 585 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

A. *Background*

The Respondent, VCS, began operations in 1976, providing day care services for children of low income families in Cheswick, Pennsylvania. The Company expanded into day care for handicapped children and then opened group homes providing residential care for severely handicapped children and adults who required intensive care. The Respondent was funded by the counties in which it functioned and by the Commonwealth of Pennsylvania. At the times relevant herein, VCS operated 14 or 15 intermediate care and community living arrangements and day care centers within about 100 square miles encompassing the 4 western Pennsylvania counties named above.

Celeste Emrick was the Respondent's executive director and Regis Murtha the associate executive director. Among the relevant manager/supervisors were Michael McCarthy, east operations director; Joyce Geary, nursing supervisor; Basil Maimone, quality assurance and safety committee director; Barbara Kocinski and Don Marsh, quality mental retardation professionals (QMRPs); and Program Managers Karen Surrena, Rhonda McCullough, Curt McClain, and Diane Kineer. Respondent admits the supervisory and agency status of all of the aforesaid individuals. The duties of the QMRPs, program managers, and program assistants will be described below.

General Counsel alleges the following unit as appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All non-professional employees, including program assistants,[2] licensed practical nurses, assistant teachers, teachers' aides, cooks and maintenance/drivers employed by the Respondent at its residential home and day care facilities in Allegheny, Somerset, Butler and Wesmoreland Counties, Pennsylvania; excluding program managers,[3] registered nurses, teachers, family day care providers, office clerical employees and guards, other professional employees and supervisors[4] as defined in the Act.

The parties have agreed to the inclusion of 132 named employees within the above-described unit. The Respondent, however, contends that the unit also should contain the employees of Children's Learning Services, two categories of family day care providers who supplied day care and/or food programs in their own homes under VCS auspices and others.

B. *Union Activities*

The Respondent's employees began their activities on behalf of Local 585 with discussions in June 1991[5] and continued with weekly and biweekly meetings with union officials at area hotels and restaurants starting in July. The Union conducted a large meeting of the Respondent's employees on August 12. Union authorization and membership application cards were distributed at those meetings and elsewhere. Although the Respondent admits having had some knowledge of the union activity by early August,[6] the credited evidence, discussed below, establishes company knowledge as of about mid-July. On September 19, executive director Emrick was given a letter signed by 20 employees to the effect that the employees, consistent with their legal rights, were engaged in an organizational campaign and warning that unfair labor practice charges possibly would be filed.

On September 26, the Union sent the Respondent a demand for recognition, claiming majority support in an appropriate unit. VCS did not respond. Later on September 26, the Union filed the petition for representation election in Case 6–RC–10668. Withdrawal of that petition was approved on November 1.

C. *The Alleged Unfair Labor Practices*[7]

1. Regis Murtha; Michael McCarthy

On July 15, Linda Kennel, a program assistant in the Mt. Pleasant house, was called into the basement office at that facility to discuss a reprimand. This reprimand, in itself, was not alleged herein as violative. Also present were Michael McCarthy, Joyce Geary, and Diane Kineer, whose titles and supervisory status were described above. Kennel, who was one of the early organizers for the Union, testified that she was asked if she had any problems with management. When Kennel replied that she did not, she was told that three of her fellow employees had written her up for having sat on the porch for an extended time period while they were working. Kennel asked who these employees were and, when her question went unanswered, said that she would ask around about this herself. Kennel stated that she was told ''that if I investigated it or talked about my warning to anyone that I could be fired or transferred to another home.'' She then asked whether this was because of her union organizing. McCarthy told her, ''No, what you do on your own time is your own business.''

McCarthy testified that, when Kennel asked who her accusers were, he replied that he would not tell her because he

[2] Program assistants provided direct client care, including cleaning, transportation, and other immediate services.

[3] Program managers supervised the program assistants at each facility. Their responsibilities included employee scheduling and discipline.

[4] Quality mental retardation professionals (QMRPs), by the parties' subsequent agreement, were excluded from the unit because supervisory. The QMRPs were responsible for ensuring that their houses were in licensing compliance. They evaluated clients, worked on and certified client programs and remedial goals, and trained program managers and program assistants.

[5] All dates hereinafter are within 1991 unless stated to be otherwise.

[6] It was at a meeting in early August that employee Linda Kennel told McCarthy and Murtha that she thought she had been reprimanded because of her union activities. Although five employees posted a photograph at the Belle Vernon facility in early August, which purports to show them holding a sign for Local 585, the sign is illegible and does not serve to establish company knowledge of the employees' activities purportedly depicted.

[7] The relevant facts concerning alleged violations of Sec. 8(a)(1) of the Act will be set forth under the names of the supervisors to whom the violations are attributed.

didn't want this to cause any problems in the house. When Kennel said that she would pursue the matter herself, McCarthy related that he did not threaten any specific penalties but told her ''that if she pursued or investigated this matter she would have a real problem with me.'' He assertedly had heard no mention of her union activities.

McCarthy's version of this conversation is somewhat inconsistent with the recollections of Kineer and Geary. Geary did not hear Kennel ask who had complained, and did not hear anyone respond when Kennel said that she would look into it herself. Kineer recalled no threats in response to Kennel's statement that she would ask others about the complaint but did tell Kennel that reprimands were held in confidence. Neither Geary nor Kineer admitted to having heard any reference to Kennel's union activities. Kennel was advised that she could file a grievance.

Kennel, thereafter, did file a grievance under the Employer's grievance procedure, and met twice with the Respondent's then associate executive director, Regis Murtha, on August 2 and 9, before succeeding in having the written reprimand revoked. She was accompanied at both sessions by Cheryl Smith, a fellow employee. During the first of those meetings, Murtha asked why Smith was there and was told that she was there at Kennel's request as a witness. At the second meeting, where McCarthy also was present, Murtha asked if Smith was there ''as a member of an organization or a law firm?'' When she replied that it was neither, Murtha told her that she could remain so long as she ''kept her mouth shut.''

Murtha, no longer with the Respondent, did not testify and McCarthy had no recollection of Murtha asking about Smith's affiliations. I credit Smith and Kennel.

2. Rhonda McCullough

Mary Jane Anderson, a licensed practical nurse (LPN) primarily assigned to the Bakersfield facility under the supervision of Program Manager Rhonda McCullough and Nursing Supervisor Joyce Geary, assisted the Union's organizing campaign by supplying a list of the names and addresses of the Respondent's employees at the Bakersville house. However, there is no evidence that her activity had been overtly announced.

Anderson was on a medical leave from July until mid-August. In late August or early September, after her return, Anderson spoke generally with McCullough and LPN Kim Shaffer about what had happened while she was away. Anderson testified that during that conversation, McCullough asked if Anderson knew that a union was being organized (or, as testified to by Anderson on cross-examination, McCullough merely said that she assumed that Anderson had heard that union cards were being signed). Anderson replied that she had heard something to that effect. McCullough was unavailable at the time of the hearing.[8] I credit Anderson's testimony.

3. Michael McCarthy

Anderson related that on the same day as the above-described conversation with McCullough, she answered a telephone call while at her desk which was situated about 5 feet from McCullough. McCarthy, the Eastern Operations director, was calling for McCullough. Anderson told McCullough that the call was for her, but, because (she was) busy writing, Anderson briefly kept the phone on her shoulder. In so doing, she heard McCarthy tell McCullough ''that union cards were being turned in. If anyone is caught discussing anything to do with the union or caught signing cards or anything like that, anything pertaining to the union, they were to find an excuse to fire them on the spot.'' McCullough, realizing that Anderson still was on the line, told McCarthy to wait a moment. Anderson then hung up. McCarthy denied the conversation and, as noted above, McCullough was unavailable at the time of this hearing.

In mid-September, Anderson was called in to a meeting at the Mt. Pleasant house with McCarthy, Geary, and McCullough. McCarthy asked if Anderson had started a rumor about Celeste Emrick having been being arrested for embezzlement. Anderson acknowledged that although she hadn't started the rumor, she had repeated it, thinking it a joke. Actually, Anderson had mentioned the rumor to two others, one of whom was McCullough. McCarthy then asked why Anderson favored the Union. She explained that her support resulted from problems she was having with her scheduling and unpaid insurance claims. In response to McCarthy's question, Anderson stated that she had gone to her immediate supervisor with those problems but that nothing had been done. McCarthy then asked why Anderson had signed the union card, telling her that because she was a professional, she could not do so. Anderson disputed this. McCarthy told her there was a rumor that, if the Union came in, there would be a strike. Anderson also disputed this, telling McCarthy that he did not know the employees very well. They would not abandon the clients.

Geary did not recall having spoken to Anderson about her signing a union authorization card. McCarthy denied all of Anderson's description of the above mid-September meeting other than the questions about the Emrick rumor which he told her not to repeat. Noting that the statements attributed to McCarthy by Anderson are consistent with statements attributed to him by others and with other conduct engaged in by Respondent's supervision, I find Anderson to be a credible witness. Neither Anderson's admitted conduct in further publicizing the Emrick rumor nor the fact that Respondent had discharged her husband more than a year before warrant discrediting her testimony.

In mid-October, McCarthy went to the various residential homes where he showed an antiunion video and answered questions about the Union's campaign. At the Mt. Pleasant house, in the presence of Program Manager Kineer, Program

[8] McCullough was not available to testify during the final week of a hearing held during parts of 3 weeks because she was on vacation. Contrary to the Respondent's counsel, continuation of this hearing beyond the date when it otherwise was expected to, and did, close, was not warranted in order to accommodate a supervisory witness in the Respondent's employ and under the Respondent's control whom the Company declined to timely produce. In so ruling, it was noted that no claim was made that McCullough's unavailability to testify was occasioned by poor health or other emergency; that all resumed dates had been previously agreed to by counsel for the respective parties, including for the Respondent, and that inherent in such agreement was the prospect that, barring emergency or special circumstances not applicable here, counsel would be prepared to proceed. This is particularly applicable since the widely spaced hearing sessions held during segments of 3 summer months had resulted from efforts to accommodate the parties' conflicting schedules.

Assistant Shirley Harusek recalled that McCarthy had stated that, ''when he thinks of unions he thinks of strikes and, if a union would come in, there was no doubt in his mind that the Company would file bankruptcy or completely shut down.'' Ruth Ann King remembered that McCarthy repeatedly had said that if a union came in they would be forced to close down . . . if a union came in, it would demand more money and that there was no more money. When King raised her hand after McCarthy asked for questions, he looked at her and asked what she would do if she went to the well and the well was dry. McCarthy did not respond when told by employees that the campaign was not strictly about money.

The Respondent called Carol Dubnansky, an employee at Mt. Pleasant, to testify about the video meeting after she earlier had testified as General Counsel's witness. Dubnansky recalled other employees asking McCarthy whether the Company would declare bankruptcy or close down if the Union came in. He replied in response to both questions that he ''could make no promises'' that those events would not occur. She also recalled, on cross-examination, that it was McCarthy who had brought up the subject of strikes, stating that a strike was likely because there was no money and that a strike would pose problems for the Company. McCarthy also spoke of bringing in someone else to care for the clients. Dubnansky recalled that McCarthy had said that, if that happened, he ''could make no promises'' whether that new service provider would keep or hire the present work force.

At the Ruffsdale house, according to employee Helen DeForrest, McCarthy, after showing the film about unions to approximately 13 staff members in October, predicted that if a union came in, the employees would go on strike at the Ruffsdale and Mt. Pleasant houses, leaving no one to take care of the clients. In that event, he said, the Company would declare bankruptcy. To counter DeForrest, the Respondent called employee Clyde Williams, who also had been at the Ruffsdale meeting, but he had little recollection of the details of the meeting other than that he had not heard anything said about bankruptcy or the closing of the house. He did not remember McCarthy saying anything about strikes. William's recollections were negative in form. Had he heard anything said about bankruptcy, Williams would have begun looking for another job. Williams' testimony, and that of employee Keith Herbert[9] to the same effect, was not persuasive.

McCarthy acknowledged that he had shown a video and spoken to employees at the Mt. Pleasant, Ruffsdale, and other houses. He testified that he had discussed the Respondent's financial problems on these occasions but denied ever having mentioning the word ''bankruptcy,'' having said that when he thought of unions, he thought about strikes or having told the employees that the houses would close down. He also related that he had discussed union dues and constitutions and had told the employees that he was not opposed to organizing but merely was encouraging everyone to vote. McCarthy related that his only mention of a strike was in reference to what had happened at a hospital in Cannonsburg.

[9] Herbert, who had signed a union authorization card on August 13, asked in mid-October that it be returned to him after he had attended the Ruffsdale meeting.

Given the credible testimony of Marusek and DeForrest, as essentially corroborated by Dubnansky when called as a Respondent's witness, and McCarthy's unconvincing denials, I credit the General Counsel's witnesses as to what occurred at these meetings.

4. Joyce Geary; the Respondent's no-solicitation rule

On about August 27, graduate nurse Rocco Sciore[10] solicited two of his fellow employees to sign union authorization cards at the Belle Vernon house while they were making beds. His immediate superior, nursing supervisor Geary, called him the next day.[11] As he recalled their telephonic conversation, Geary stated that she knew Sciore was a union supporter; that that did not matter to her but that, ''[Y]ou know you are not permitted to solicit union materials or activities [sic] on company property, company time or in front of the clients.'' She also announced that she was aware that Sciore had solicited cards at the house a day earlier. Admitting to Geary that he had done so, he promised not to do it again.

Geary recalled that she had learned from another staff member that Sciore had talked about union activities while he was working. She testified that she had told Sciore ''that he could not talk about such activities in front of the clients and couldn't do it on working time.'' On cross-examination, she corroborated his testimony, acknowledging that she told him she knew he had been soliciting for the Union and that he was not allowed to do it on company time or property or in front of clients. He agreed to comply. She denied that a policy had been promulgated, insisting that she merely had responded to an individual situation, a complaint from another employee about Sciore's activities.

Employee Cheryl Smith recalled that Diane Kineer had told her on some unspecified date that ''they did not want them to have union activity on company time.'' Kineer did not contradict Smith's testimony.

Solicitations by staff, employees, and supervisors were common at the Respondent's houses. Sciore had sold candy to benefit his nursing class and the program manager was among those who had bought from him. Other staff members sold candy, sandwiches, and cookies as fund raisers. Diane Kineer had taken orders for Avon products from employees while they worked.

On or about August 28, Cheryl Smith overheard Geary talking to unit employee Barbara Stillman by Geary's desk in the basement of the Mt. Pleasant house. Although she did not hear the entire conversation, she did hear Geary say, ''I know who is responsible for starting the Union.'' Geary denied having made any such statement to Stillman or to anyone else. Stillman did not testify.

[10] Originally retained as a licensed practical nurse (LPN), Sciore became a graduate nurse in May awaiting certification as a registered nurse (RN) and, in September, an RN. While the Respondent's RNs and LPNs essentially did the same work, the RNs could administer higher level of medication. However, apparently on the basis of his having become a graduate nurse, Sciore, once in July, took Geary's beeper so as to be able to respond to emergencies at any facility. By the time of the Union's September 26 demand for recognition, Sciore was a registered nurse and not within the bargaining unit.

[11] Sciore was assigned to the Respondent's Belle Vernon house while Geary's office was at Mt. Pleasant

Sciore testified that on September 4, Geary asked if he would like more money or would he like benefits? Sciore replied that the employees probably would want both but he would ask around and get back to her. He never did. Geary did not mention the Union in this conversation, which allegedly took place by telephone during one of their regular discussions. Geary denied having asked Sciore any questions about money or benefits.

Ray Goodwin, a program assistant at Ruffsdale, testified that on September 23, Geary asked ''if the union we were trying to get in was the same union they were trying to get in at Butler.'' When he replied that he did not know, she told him that the union in Butler was Local 585. Although the General Counsel asserted, on brief, that Goodwin was not a known union supporter, his signature is among the 20 on the Union's above September 18 letter to Emrick.

Other than her conversation with Sciore about union activities on company time and property or in front of clients, Geary denies having made all of the above-attributed statements. She claimed not to have discussed the Union's activities with any of her staff throughout the entire campaign period, stating that she was disinterested and was neither pro nor antiunion. She, however, admitted being aware of Goodwin's involvement in union activity from statements made to her by other members of the staff, and also had seen his name among those of the other employees who had signed the Union's September 18 letter to Emrick. I find her denials less persuasive than the convincingly detailed testimony offered by the several employees as described above.

5. Diane Kineer

On November 1, shortly after the Union withdrew its petition for representation election, employees distributed union flyers outside the Mt. Pleasant house. When employee Cheryl Smith arrived at work, her program manager, Kineer, asked why Smith had not given her a copy of the flyer that was being passed out. Smith replied that they were not supposed to give then to management, only to coworkers. Kineer then asked her, ''What makes you think that Celeste [Emrick] won't continue to fight the Union now that she is in the black?'' Smith replied that she did not know.

Although the Union's house representatives at Mt. Pleasant had passed out several flyers there prior to this incident, Smith never had given one to Kineer.

Kineer did not deny this conversation.

6. Beth Kocinski

On June 28, a staff picnic was held at Natrona Heights. Linda Kennel described a statement made to her by Beth Kocinski, the QMRP, in Program Manager Diane Kineer's presence at the basement of the Mt. Pleasant house about 3 days before that event. Kennel testified that as she was telling Kineer that she would attend the picnic, Kocinski said to her, ''If you are going to this picnic to cause trouble, it will be videotaped.'' Kocinski did not reply to Kennel's request that she define ''trouble.'' Kocinski and her husband thereafter videotaped employees at the picnic. There was no evidence that any union activities took place there.

Kineer that recalled Kocinski had told employees that her husband would be making videos at the picnic, copies of which would be given to each house. She was not sure whether she was present when Kocinski told this to Kennel but recalled no conversation wherein Kocinski told Kennel that she would be videotaped if she caused trouble.

7. Curt McClain

Several employees testified to conversations with Curt McClain, the program manager at Respondent's Belle Vernon house, and/or to questions from him concerning the Union. These employees spoke freely to McClain on the subject, making no effort to keep their union activities secret apparently because, earlier, while a program assistant (and Linda Christner, alleged herein as a discriminatee, was his program manager), McClain had begun a union campaign.

Accordingly, Linda Christner, by June, having reversed their roles by becoming a program assistant under McClain, volunteered to him during that month that she was engaging in organizing activities. According to Christner, McClain's reaction had been an unconcerned ''whatever.'' Initially, Christner's testimony concerning conversations with McClain were general, phrased in terms of what he ''would'' do during as many as five or six conversations, rather than what he had done. When pressed for more specificity, she testified that when, in early August, McClain came into the living room of the house and asked, ''What's going on with the Union,'' she told him that it was moving along and gaining support every day. On cross-examination, she testified that, in early August, McClain had asked employee Michael Sauritch and herself, ''What is going on in your lives?'' to which they replied that they were supporting the Union and going to meetings. She continued to maintain that he also had asked her ''What was happening with the Union?'' On about August 15, while riding in the van, McClain allegedly asked her, out of the blue, ''Who started the Union at the Mt. Pleasant house?'' Christner, surprised, was not certain of her response.

Christner described a conversation with McClain in the kitchen of the Belle Vernon house on a Wednesday in early September in the presence of another assistant, Lois Sauritch.[12] According to Christner, McClain stated that, ''[i]f the Union came in . . . Mrs. Emrick would close the place down, open up under a new name and hire all new staff.'' Christner then left to take clients out to the van and did not know what else might have been said. On cross-examination, Christner recalled this conversation as having taken place on September 25, rather than September 4, and McClain as having stated that this was something Mrs. Emrick had said she would do. She further asserted that McClain had repeated this statement several times. Similarly, in a conversation on about November 6 (after Christner's reinstatement), again in the kitchen with Lois Sauritch present, McClain assertedly told her ''out of the blue'' that, ''[i]f the Union comes in, he's going to have to crack down on us and watch our every move.'' Christner replied, ''So what.'' Christner related that other employees probably were present at this time.

[12] Lois Sauritch was the mother of two other Respondent's employees, Michael and Patrick Sauritch. As will be discussed below, Michael Sauritch's discharge is an issue of this proceeding. Christner, who was terminated at the same time as part of the same incident, thereafter was reinstated. As noted, her discipline, too, is at issue.

Rocco Sciore testified that, in mid-August, McClain told him that it did not matter whether or not they got a union; that nothing was going to change; and that they would get no more money or benefits. Sciore did not reply.

Lois Sauritch testified that, in the same time period, McClain told both her and Christner that he hoped that he would benefit from the Union, too, and that, if it did come in, he would have to crack down and get tough on them. He purportedly concluded by stating that Celeste (Emrick) would never give in to the Union.

Similarly in mid-August, 1 or 2 days after an August 12 union meeting, Michael Sauritch volunteered to McClain that he had attended that meeting. About 2 weeks later, McClain allegedly told Michael Sauritch that ''Mickey McCarthy had been down here today and he was asking around to see who was the head of the Union at the Belle Vernon house . . . that Mickey mentioned a few names . . . Sherri Zelmore . . . others . . . Lois Sauritch.'' Lois Sauritch testified to a similar conversation with McClain which, she related, had occurred in early August. So did Patrick Sauritch who testified that in late August, McClain initiated a discussion about the Union. McClain told Patrick Sauritch that he knew about the meeting, that if the Company went union he would have to stop being friendly with them and start getting tough, and that McCarthy was trying to find out who was backing the Union. Patrick Sauritch volunteered that he was a strong supporter of the Union's campaign. Again, in September, before the representation case petition was filed, McClain allegedly told Mike Sauritch, ''If we voted in the Union the Company would go bankrupt.''

McClain had no recollection of, and denied, most of the statements attributed to him. He denied initiating a conversation with Christner in the van and claimed that she raised the subject of the Union. In that conversation, he admitted having asked her what house had started the campaign (to which Christner had replied the Mt. Pleasant house had started it) and what the problems were, but denied having inquired as to which employees were involved or what was happening with the union campaign. He also denied having threatened that he would have to get tougher; that Emrick would never give in to the Union; that, if the Union came in, Emrick might close and reopen under a new name; or that the Company would file for bankruptcy. He admitted having told employees that it would be harder for everyone if there were a union, referring to the need to communicate through a union steward rather than directly. He also admitted having told Patrick Sauritch that if a union came in, they could not be as friendly as they were, that he would have to deal with a steward and not directly with the employees and that guidelines would be get because he was management and they were staff.

Given the mutual corroboration by General Counsel's witnesses, the similarity of themes voiced by the various supervisors, McClain's admissions and his inability to recall certain key conversations, I credit Christner, Sciore and the three Sauritch family members over McClain. I find that there was frank discussion of the Union between McClain and these employees who openly proclaimed their support for the Union. I further find that, at various times between August and November, McClain asked what was going on and who was involved, with the Union. He told several employees that his superior, McCarthy, wanted to know who was involved with or leading the union campaign. He also told them that if a union came in, the relationship between them would change and he would have to get tougher with them; that Ms. Emrick would never give in to a union; that being represented by a union would not get them more money or benefits, that a union would cause the Company to go bankrupt; and that, with a union, the Company might close and then reopen under a new name with new staff.

8. Karen Surrena

On September 24, Cynthia Schlagel, a program assistant at the West Sunbury house, received a telephone call at home from her program manager, Karen Surrena. Schlagel testified that Surrena asked whether she had attended a union meeting that day; when did Schlagel sign up; if everyone had been at the meeting; and what had been discussed. Schlagel replied that she had signed up at the meeting and answered Surrena's other questions in general terms. After discussing other matters, Surrena concluded by telling Schlagel that, ''[t]hings are going to get rougher.''

Later that week, Surrena asked to speak to program assistant Gertrude Jones in the basement of the West Sunbury house. Jones related that, there, Surrena asked if she had a problem with Surrena or with working there; if Jones had attended the union meeting and who else had been there. Jones admitted that she had attended the meeting but declined to name others who had been there. In response to Surrena's question, Jones denied that it had been held at the house of an employee whom Surrena had named in that connection.

Surrena admitted that, in September, she had called Schlagel asking if she knew anything about a union meeting, but denied that she had pursued the subject after Schlagel said, ''[Y]es.'' Beyond that conversation, Surrena claimed, it was Schlagel who had initiated discussions about the Union, volunteering information about the campaign and its goals. Surrena denied having told Schlagel that things would get rougher with a union and asserted that Schlagel volunteered to tell Surrena anything she wanted to know about the campaign.

Surrena recalled that she had spoken to Jones about Jones' assertedly rude behavior in not talking with her. She asked what Jones' problem was. When Jones denied that there was a problem, Surrena stated, ''Ever since the union started around here, you have a really bad attitude.'' Jones said something about having problems at home and denied that her attitude was related to the union campaign.

I find improbable Surrena's testimony that, having received a positive response from Schlagel when she called to ask if Schlagel knew anything about a union meeting, Surrena did not inquire further but just dropped the matter. I find that both Schlagel and Jones, who no longer is employed and, therefore, was a comparatively disinterested witness, were credible. Noting the improbability of Surrena's testimony concerning her interrogation of Schlagel, Jones' disinterest in the proceeding when she testified, and the commonality of themes voiced by the various managers, I credit the testimony of Schlagel and Jones over that of Surrena.

9. Celeste Emrick

From August to about mid-October, Emrick held a series of biweekly meetings at the Mt. Pleasant facility which the

employees voluntarily attended, without compensation. While employees from each of the Respondent's homes were at these meetings, including some who testified in this proceeding, the General Counsel called only one, Cheryl Smith, concerning the meetings with Emrick.

Smith testified that, starting in mid-August, Emrick conducted those meetings every other Thursday. During the mid-August meeting, Emrick asked what were the employees' concerns or complaints. In response, the employees raised various topics relating both to themselves and the clients. On their own behalf, employees asked about the unpaid insurance bills, scheduling of holidays and overtime and overtime pay. Emrick said that the insurance problems, holiday scheduling, and matters concerning overtime would be looked into and that the employees would be paid for any overtime worked. With respect to the clients, the employees asked about the possibility of getting more wheelchairs and whether they could take the clients to church. Emrick told them that there was no money for wheelchairs but that she saw no problem with taking clients to church. She stated that a purpose of the meeting was to discuss cost-cutting and to receive suggestions directed to that purpose. Emrick asked the employees if they had any ideas for fund raising. The employees were requested to tell the other employees at the homes where they worked what had been discussed.

After this meeting, Smith was paid for her overtime and the project manager passed out index cards for the employees to designate the holidays when they preferred to be off.

According to Smith, at the next meeting, Emrick asked the employees if their complaints, like the the church issue, had been resolved and was told that they had been. Christner asked about insurance claims and was told that they were being taken care of. When the matter of wheelchairs again was mentioned, Emrick reiterated that there was no money for them and asked if the employees were interested in raising funds for such equipment. Smith testified that Emrick's third meeting with employees essentially was a repetition of the second.

These meetings were discontinued after the November 1 withdrawal of the pending petition for representation election and were not thereafter resumed.

According to Emrick, as corroborated by Geary, two meetings were held at Cheswick and five or six at Mt. Pleasant to explain and discuss the Employer's money problems, including the difficulties in meeting the payroll in August and the problems with a health insurance carrier who was not paying medical bills. For a time during the summer, the employees had worked without pay. State funding had been delayed and some employees had called state offices with questions which later were related to Emrick.

Emrick testified that, at the first meeting, she apologized for the problems, explained where the Respondent's funding came from, expressed appreciation for the employees' work, and took questions. She asked what problems the employees' were having with respect to their health insurance and delayed pay because the Respondent was calling lenders and landlords on their behalf to request patience and forbearance. Emrick related that she had asked about employee problems only in this context. Wheelchairs, fund raising, church-going for the clients, cost-cutting, and disparate treatment in the assignment of overtime all were discussed.

At a later meeting, the employees were told that payroll would be met. Emrick recalled that one employee asked whether the Respondent was going to file for bankruptcy. She told him, ''Absolutely not,'' that bankruptcy would cost them the licensing they had worked for 3-1/2 years to acquire. The closing of facilities was not discussed and there was no mention of the Union or its campaign.

10. Discussion of the 8(a)(1) allegations

a. *Interrogation*

In *Rossmore House*,[13] the Board eschewed a per se approach and held that ''an employer's questioning of open and active union members about their union sentiments, in the absence of threats or promises [did not] necessarily'' interfere with, restrain, or coerce employees in violation of Section 8(a)(1) of the Act. The Board stated that each case would be determined on its facts. Factors to be considered included the background, the nature of the information sought, the identity of the questioner and the place and method of the interrogation. In *Sunnyvale Medical Clinic*,[14] the Board described the *Rossmore House* test as ''whether under all the circumstances the interrogation reasonable tends to restrain, coerce, or interfere with'' statutory rights. That test, it was stated, applied whether or not the employee was an open and active union supporter. *Rossmore House* and its progeny remain the controlling precedents.[15]

The earliest incident of interrogation alleged by the General Counsel is Murtha's August 2 questioning of Cheryl Smith during a grievance meeting concerning a reprimand given to Linda Kennel. Smith, present at Kennel's request as a witness, was asked if she represented an organization or a law firm. Smith was an open union adherent and the Respondent apparently had sought to clarify the reason for her presence. There was no reference to the union campaign. Under these circumstances, I find no violation of Section 8(a)(1).[16]

Similarly innocent, I find, is McCullough's mid-August question to Anderson concerning whether she had heard that there was union activity underway. This essentially rhetorical statement by her program manager, a first-line supervisor, did not call for an answer that would reveal Anderson's activity or sympathies. It was not followed by any antiunion statements or more probing questions when Anderson acknowledged that she was aware of the that activity.

McCarthy's mid-September questioning of Anderson, however, was more coercive. There, Anderson, who was not a known or open union supporter, in the context of a disciplinary-type inquiry, was confronted by three levels of supervision, the east operations director, the nursing supervisor, and her program manager. Anderson was asked why she favored the Union and why she had signed an authorization card. When she answered the last question, she was told, er-

[13] 269 NLRB 1176, 1177–1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985).

[14] 277 NLRB 1217 (1985).

[15] See *Fontaine Body Co.*, 302 NLRB 863, 865 (1991).

[16] Whether Kennel's version or that of McCarthy is credited, Murtha's threat of reprisal to Kennel should she investigate the complaints that led to her reprimand, while not alleged as an independent unfair labor practice, evidenced a hostility to protected concerted activity.

roneously, that it was improper for her to have signed one because she was a professional. Moreover, prior to this conversation, as noted above, Anderson had heard McCarthy tell McCullough that an excuse should be found to discharge employees found to have signed authorization cards. Accordingly, I find that the Respondent, in putting these two questions to Anderson, respectively violated Section 8(a)(1) of the Act.

Linda Christner was an open union supporter, having volunteered as much to McClain in June. Thus, his later question to her, merely asking what was happening with the Union, cannot be deemed coercive in violation of Section 8(a)(1) of the Act. On the other hand, McClain's query of Christner in the van, concerning who had started the union activity at another house went beyond legitimate banter. McClain's inquiry in this regard sought information about the union activities of other employees, never a permissible subject of inquiry,[17] and occurred in the context of McClain's various threats to other employees, which will be discussed below. Among the things McClain had told employees was that McCarthy was asking around about the the Union's campaign leadership.

Nursing Supervisor Geary's questions to two employees are alleged as violative interrogations. The first was her question to graduate nurse Sciore concerning his preference for more money or greater benefits. This query did not delve into his already known union sympathies.[18] The second, asked of Goodwin, who had signed the September 18 organizing notice letter to Emrick, similarly did not require that he divulge either his own or anyone else's union proclivities. It merely asked a known union adherent whether the same union was involved in organizing the Employer's various facilities. I find neither question to have crossed the line into impermissible interrogation.

Finally, in this regard, there is the September 24 telephone call by Surrena to Schlagel where Schlagel was asked about her own union activities and about the union activities of other employees. This interrogation was concluded with an amorphous threat that ''things are going to get rougher.'' The coercive nature of such interrogation, to an employee with no demonstrated open union proclivities, is patent and violative of Section 8(a)(1) of the Act, respectively with regard to the interrogation concerning Schlagel's union activities, the union activities of other employees, and the aforesaid threat.

b. *Solicitation of grievances; promises and grants of benefits*

The complaint alleges that Emrick, during the meetings she conducted, solicited the employees' grievances and promised them increased benefits and improved terms and conditions of employment if they refrained from supporting the Union.

Weighing the General Counsel's failure to adduce available corroborating testimony against the thoroughness of Emrick's recollection of these meetings, as corroborated by Geary, I credit Emrick and find that the meetings were called to discuss serious economic problems. Emrick's questions about problems the employees were having related to the delayed paychecks and management's efforts to assist the employees adversely affected by them. Questions raised by the employees only were incidental to this and the Union was not mentioned at any of the meetings. I do not conclude that Emrick's conduct during these sessions amounted to unlawful solicitation of grievances or the promises of benefit intended or likely to result in lessened support for the Union. Similarly, I do not find that the correction of some of the problems related by the employees, coincidental with improvement in the Employer's financial situation, constituted a granting of benefits to dissuade the employees from supporting the Union.

c. *Surveillance and creating impressions of surveillance*

General Counsel alleged the videotaping of ''any union activities . . . occurring at'' the June 28 staff picnic as coercive surveillance. When the picnic was held, the campaign was incipient, little more having occurred in that regard than some telephone contacts. There was no evidence that management knew of union activities at that time or that employees engaged in conduct on the Union's behalf at the picnic. Therefore, noting the absence of evidence of company knowledge, the ambiguous nature of the statement attributed to Kocinski, the frequent practice of video-taping social events,[19] and the absence of any evidence that the employees were engaged in union activities at the picnic, I find that Rocinski did not violate Section 8(a)(1) of the Act merely by telling employee Kennel, 3 days before the company picnic that, if she was going to that even to cause trouble, it will be videotaped.[20]

The test of whether an employer has unlawfully created an impression of surveillance of its employees' union activities is ''whether the employees could reasonably assume from the actions or comments of a respondent that their union activities had been placed under surveillance.''[21] General Counsel alleges that Geary's late August statement regarding Sciore's inhouse solicitations; her comment to Stillman, overheard by Cheryl Smith, to the effect that she knew who was responsible for starting the union activities; and Surrena's questions to Schlagel and Jones, in late September, concerning whether they had attended, or knew anything about, a union meeting, created such impressions.

As previously noted, certain Respondent's employees engaged openly in their union activities; some volunteering to their immediate supervisors information concerning the meetings and their participation. In these circumstances, merely telling employees that a supervisor is aware of a union meeting, knows when it was held, and believes (erroneously) that

[17] *Liquitane Corp.*, 298 NLRB 292, 293 at fn. 4 (1990); *Resolute Realty Management Corp.*, 297 NLRB 679 fn. 3, 685 (1990); *Raytheon Co.*, 279 NLRB 245 (1986); *Dependable Lists, Inc.*, 239 NLRB 1304, 1305 (1979).

[18] This more properly should have been alleged as a solicitation of grievances/implied promise of benefits.

[19] An employer's conduct in photographing employees in neutral circumstances is innocuous and not violative of the Act, even in the context of a jocular ''threat.'' *Bardcor Corp.*, 270 NLRB 1083 (1984).

[20] The complaint alleged acts of interrogation by Kocinski on September 4 and 23. As the record contains no evidence supporting these allegations, they are dismissed.

[21] *Hudson Oxygen Therapy Sales Co.*, 264 NLRB 61, 69 (1982), citing *Schrementi Bros.*, 179 NLRB 853 (1969), and *South Shoe Hospital*, 229 NLRB 363 (1977).

it was held at a particular employee's home does not rise to the level of a violation under the test set forth above. Where there is open union activity, such knowledge could have been attained by the supervisor without need for surveillance. In Sciore's case, the record reflects that another employee had reported his solicitation to Geary and, as will be discussed below, she told him of this in the course of admonishing him about solicitations during working time. However inhibiting such a statement might be, it does not necessarily convey an impression that management is encouraging employees to make such reports or is trying to observe employee union activities.

Accordingly, I shall recommend that complaint allegations concerning surveillance and creating the impression of surveillance be dismissed.

d. *No-solicitation rules*

The record establishes that after Sciore had been reported as having solicited for the Union while at work, Nursing Supervisor Geary told him that he was ''not permitted to solicit union materials or activities on company property, company time or in front of the clients.'' The record also establishes that other solicitations, particularly for charitable fundraisers but also for personal business ventures such as the sale of Avon products, had been permitted at work during working time with the knowledge and participation of supervisors. General Counsel attacks the restrictions Geary placed upon Sciore as both overly broad and discriminatory. The Respondent contends that the restriction was limited to ''working hours'' and that Geary's intention was that Sciore not solicit in front of clients and while he and the other employees were working.

In agreement with the General Counsel, I find that the limitation placed upon Sciore, while generally not widely applied, was unlawful. An employer may not single out union solicitations or distributions for prohibition while, at the same time, permitting employees to solicit for their private enterprises and favorite charities.[22] Neither may it prohibit employees from engaging in such solicitations and distributions on its property during their own, nonworking time. Geary's direction to Sciore to not engage in such activities on company property and during ''working hours'' would preclude him from engaging in union activities on his own time.[23] Clearly, when employees are permitted to talk freely among themselves while working, an employer may not prohibit them from talking about their union activities, at least when those discussions do not rise to the level of a solicitation or distribution.[24] Accordingly, the Respondent's no-solicitation rule enunciated by Geary is violative of Section 8(a)(1) of the Act because it is too broad and discriminatorily applied.

e. *Futility of union representation*

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act when Kineer asked Cheryl Smith, ''What makes you think Celeste won't continue to fight the Union now that we're in the black?'' and when McClain told employees that ''Mrs. Emrick would never give in to the Union.'' Such remarks, it is contended, inform the employees that it would be futile for them to select the Union as their bargaining representative.

Statements by which an employer tells its employees that it will refuse to bargain in good faith are violative because they suggest that it would be futile for employees to select a union as representative.[25] Similarly, statements which convey a sense that it would be futile to pursue organizational efforts violate Section 8(a)(1) of the Act. For example, in *Ideal Elevator Corp.*,[26] the employer's statement that he would fight the union to his last penny and that that Company always had been, and always would be, nonunion was found violative. Similarly, in *Money Radio*,[27] the employer's remark that he ''would sooner die than let the Union in'' was deemed violative of Section 8(a)(1). On the other hand, a statement to the effect that the Employer would continue to operate, reviewing and granting benefits, as it always had, was deemed permissible campaign rhetoric within the ambit of Section 8(c) of the Act.[28] In *Rossmore House*, supra, the employer's remark that it would ''fight [the union's organizational efforts] to the hilt'' did not warrant a conclusion that interrogation contemporaneous with that statement was coercive.

The statements of Kineer and McClain, both low level supervisors, were similarly permissible campaign rhetoric. An employer is permitted to campaign against a union's efforts to secure representational rights; it is similarly free to engage in hard bargaining with a union that has won such rights. It is not obligated to concede victory to the union or to ''give in'' to its demands for either recognition or benefits. These statements by Kineer and McClain do no more than assert that the Respondent would exercise its legal rights and were not violative of the Act.

However, McClain's mid-August comment to Sciore that whether the employees got a union or not, nothing would change, they would get no more money or benefits, clearly falls among those cases holding that suggestions of future bad faith bargaining are violative of Section 8(a)(1) of the Act.

Complaint paragraph 10(f) alleges a similar violation attributable to McCarthy, occurring about October 15, unreferenced in the General Counsel's brief. The record, however, indicates that McCarthy merely had told employees that the Union would demand more money and there was no more money. Given the Employer's recent and continued financial travails, in contrast to McClain's above conclusionary statement that bargaining would have no result, McCarthy's statement was but a lawful expression of his opinion and

[22] *Jakel Motors*, 288 NLRB 730 fn. 2 (1988).

[23] Working hours'' connotes periods from the beginning to the end of the work shift, including the employees' own time. *Contemporary Guidance Services*, 291 NLRB 50, 66–67 (1988); *Our Way, Inc.*, 268 NLRB 394, 395 (1983); *Essex International*, 211 NLRB 749 (1974).

[24] *Litton Systems*, 300 NLRB 324 (1990); *Cannon Industries*, 291 NLRB 632, 634 (1988).

[25] *Aquatech, Inc.*, 297 NLRB 711 fn. 1 (1990).

[26] 295 NLRB 347, 351 (1989).

[27] 297 NLRB 698, 702 (1990).

[28] *Camvac International*, 288 NLRB 816, 820 (1988).

constituted no more than a realistic appraisal of the give and take of collective bargaining.[29]

f. *Threats*

I have found above that Anderson had overheard McCarthy directing McCullough to find excuse to discharge anyone speaking about or otherwise having anything to do with the Union. Such a threat violates Section 8(a)(1)[30] whether or not it was intended for the employee's ears and whether or not it was carried out. The violation turns on the tendency of the employer's conduct to interfere with the free exercise of statutory rights, not on the employer's motives.[31]

I also have found that both McCarthy and McClain told employees that the advent of the Union would cause the Respondent to declare bankruptcy or close down, reopen under a new name, and that McClain told employees that, if the Union got in, ''things would get rougher'' or that he would have to ''crack down and watch'' every move the employees made. No citation of authority is required to establish such threats as respective violations of Section 8(a)(1) of the Act.

11. The alleged discriminatory discharges—facts and conclusions

Linda Christner, Michael Sauritch, and Monika Welsh were program assistants at the Delle Vernon house. Christner and Sauritch were openly supportive of the Union's campaign and the undisputed evidence is that management was aware of their prounion sympathies and activities. Christner had been a signatory to the above September 18 letter from the Union to Emrick. Sauritch's union activities principally had consisted of signing an authorization card for himself and, with authorization, for his brother, Patrick, at a union meeting. Except that she had signed a union authorization card on September 1, the record is silent on Welsh's union activities. No charge was filed on her behalf.

On September 30, Christner, Sauritch and Welsh took six or seven Belle Vernon house residents for a drive through Round Hill Park in a Respondent's van. Christner drove the van while Welsh occupied the front passenger seat and Sauritch the bench seat in the back of the van, between two residents. Four residents, in wheelchairs, were between him and both the driver and the doors. Sauritch was responsible for watching the residents, some of whom had behavioral problems and others who were subject to seizures.

As they entered the park, Welsh observed a pond with ducks. She asked to get out to better observe the ducks. Accordingly, Christner stopped the van, Welsh got out and the van proceeded through the park. When the van returned to the pond, Welsh was holding a mallard drake in her arms which she wanted to show the residents. Christner opened the van doors so that the residents could see the duck. After a couple of minutes, Welsh insisted on getting into the van with the duck, declaring that she was going to take it home to breed with some ducks she owned. Christner insisted that she release the duck; that they would not leave the park with the duck in the van. Christner told Welsh that she would turn her in at the park office unless the duck was released. When Welsh did not give up the duck as requested, Christner drove to the park office. After Christner repeated the threat to turn Welsh in, Welsh released the duck. The van, with all occupants, returned to the house. Nothing was said or reported by the three program assistants.

On the following day, the secretary at the Respondent's main office phoned Michael McCarthy and told him of a received call from a police officer concerning the alleged theft of a duck by persons in a Respondent's van. Purportedly, the officer told her that it had been reported that a man and a woman had grabbed a duck from the park and thrown it in a cage in the back of a van, later identified as the Respondent's van assigned to Belle Vernon, and had driven off while citizens yelled at them to stop. The officer alluded to the possibility that the van could be confiscated by the Fish and Game Department. McCarthy reported the call to Emrick, who said she would notify the appropriate state and county officers that an investigation was underway. He also called McClain at the Belle Vernon house and asked him to arrange a meeting with the staff. Sauritch and Christner met with McCarthy on October 1.

At the October 1 meeting, according to the employees, McCarthy laughed about the incident. However, he also told Sauritch that the incident was serious as the van might be impounded and he warned that Sauritch might be suspended as a result. Each employee was questioned individually and each described the incident as set forth above. Sauritch told McCarthy that he had not been in position to do anything, having been blocked in the back of the van by the wheelchairs. McCarthy asked why Sauritch had not reported the incident.

After speaking with the employees, McCarthy met with the complaining police officer at the park. The officer related that the duck-napping had been reported by a couple from Ohio who stated that a man and woman had taken the duck and thrown it in a cage in the back of the van.[32] McCarthy was told that the missing duck was a tame park pet named ''Daffy'' and, if Daffy was not found, the van could be confiscated and the occupants fined. When McCarthy asked that a search be made for Daffy, the park supervisor called out the duck's name and Daffy came flying or waddling in to them. At that point, the police officer said that the matter would be pursued no further.

McCarthy returned to the house and prepared a report of the incident. He also told Emrick that, as Daffy had been found, no police action was being contemplated. He convened a meeting of the safety committee.

The Respondent's safety committee, consisting of McCarthy, Maimone, Geary, and Marsh, reviewed the incident and recommended that all three employees be discharged. Welsh was to be discharged for leaving her post, Christner for driving without an aide in the front seat and for not reporting the incident and Sauritch for not reporting the incident although he had not been positioned to prevent it.

Emrick received a copy of the safety committee's report on the following day and told McCarthy that she would support its disciplinary recommendations. Emrick explained that, under the Respondent's personnel policies, termination for ''gross misconduct'' required no prior record of discipline.

[29] See *Telex Communications*, 294 NLRB 1136, 1139–1140 (1989).

[30] *Capitol Transit*, 289 NLRB 777, 783 (1988).

[31] *Nemacolin Country Club*, 291 NLRB 456, 460 (1988).

[32] It is not unreasonable, when viewed from a distance, that someone would mistake the van wheelchair lift for a cage.

She testified that Christner had acted irresponsibly, placing the clients in jeopardy in an abusive situation. In particular, she noted that Christner had allowed a staff person to leave the van, reducing the ratio of clients to staff from seven to three to seven to two. Emrick testified that both Christner, who had been a program manager, and Sauritch knew that this was an unusual incident which should have been reported, adding that she had considered that bringing a wild animal into contact with the clients raises risk of infection. Emrick alluded to the illegality of the employees' conduct and pointed out that Christner, the most senior assistant, was driving the van and could have refused to comply with Welsh's request to stop. Emrick stated that the decision to discharge Sauritch was not based upon prior discipline he had received.[33]

All three employees were called and told that they were discharged. Christner and Sauritch filed grievances; Welsh, as a probationary employee, was not allowed to do so.

Christner gave her grievance to McClain who told her that there was no reason for the discharge other than the attorney's recommendations and that she and the employees should have filed an incident report. Christner told both McClain and Emrick that she had not filed a report because she did not want to ''rat'' on her fellow employee. Christner's grievance, dated October 9, related that she had tried to prevent the incident, that her actions had resulted in the release of the duck and that her responsibility was care of the residents, not supervision of the staff.

Emrick replied to Christner on October 14, stating that Christner had not explained why she did not file an unusual incident report and, when such explanation was received, a decision would be made on her grievance.

On October 16, Christner wrote back that she did not file a report because the incident was resolved before they had left the park. Christner questioned why she had been discharged and stated that a reprimand or 1-day suspension would have been appropriate. On October 21, Emrick replied in writing that Christner's October 16 letter was insufficient. On October 24, Christner amplified her earlier letter, pointing out that she had worked for 3 years without a single reprimand. She requested a meeting to discuss her termination.

Christner met with Emrick on October 28. As indicated in Emrick's October 29 letter, Christner was reprimanded for poor judgment and ''gross misconduct in violation of Valley Community Services' Personnel Policies'' in failing to report the unusual incident. However, Christner, because of her discipline-free employment record, then was reinstated. Her lost time treated as disciplinary suspension.

Sauritch was not so fortunate. He had explained that he believed that there was nothing to report and that he had not been in a position to prevent the incident from occurring. On October 29, Emrick notified him that his discharge for failure to report an unusual incident would stand. Her letter noted that Sauritch had been trained to report unusual incidents and ''had two other reprimands in your personnel file that will not allow me to consider your reinstatement.'' Those prior disciplines, as noted, issued in April and May 1989, had been for failure to collect data and, again, for failures to report unsafe equipment and to perform job duties.

The job descriptions for program assistants required that ''Incident/Unusual Incident Reports are [required to be] submitted to Program Manager or Weekend Supervisor before going off duty.'' Christner, as a former program manager, was expected to know this. Both Christner and Sauritch had been ''inserviced'' with respect to incident reporting procedures and, on July 17, had signed a staff training report to that effect. Those procedures required that reports be filed both in ''unusual incident'' and more ''usual'' incident situations. Unusual incidents involved such things as outbreaks of communicable diseases, loss of a client's money or other property, injuries requiring hospitalization or resulting in the death of a client, missing clients, and incidents requiring the services of the fire department or an enforcement agency. Usual incidents were defined to include ''any other incident or occurrence that does not fall into Class I or Class II Unusual Incidents.'' Described were such things as minor injuries to residents.

McCarthy explained that one consideration in Sauritch's discharge was his failure to say anything to stop Christner from letting Welsh out of the van. He claimed that the program assistants' job description held them responsible for supervising one another when the program manager was absent. That job description and the relevant evaluation form, however, provided only that program assistants assume supervisory duties in the absence of the program manager or weekend supervisor, ''as delegated.''

At first impression, this appears to be a preposterous incident culminating in unwarrantedly heavy discipline. From the employees' perspective, nothing of significance had occurred and, to the extent that there was an incident, unusual or otherwise, it had been concluded before they left the park without harm to anyone. None of the criteria of an unusual incident were present at that point in time; no one had been hurt; and when Christner and Sauritch returned to the house, they were unaware that law enforcement personnel would become involved.

From management's perspective, however, this incident was more serious. The Respondent, entrusted by the Commonwealth of Pennsylvania with the care of clients who were fragile, physically and/or emotionally, was required to report to appropriate state authorities any matter of significance affecting these clients.

Because of the intensive care requirements for its clients, some of whom had potential for violence, the Respondent's policies mandated a strict numerical ratio between staff and clients at all times. This ratio was at least three staff members for eight clients, except when LPNs were on duty when there could be four staff persons to eight clients. Management was concerned with respect to the duck incident not only that the ratio of staff to employees be maintained on the van, but that the passenger seat next to the driver be occupied by an employee. This was because approximately two months before the incident concerning the duck, a client had tried to choke Christner while she was driving the van, after which Christner had refused to operate the van unless the

[33] Sauritch's disciplinary record with the Respondent is that he was discharged first, reinstated and later reprimanded for other offenses. Specifically, in about June 1988, Sauritch was reinstated by the Respondent after having been terminated for refusing to change soiled diapers. In April and May 1989, he received written reprimands for failure to document goal plans (client training programs) for two residents, and for failure to report unsafe equipment and to perform job duties. The April reprimand had been accompanied by a 1-day suspension.

front passenger seat was attended. The Respondent, in this context, also was concerned that Sauritch had so wedged himself inside the van as to be unable to react had there been difficulty. Accordingly, when Christner permitted Welsh to leave the van, not only was the ratio of staff to clients below the Respondent's requirements, with the clients placed at risk, but the front passenger seat again was left unattended leaving Christner, as driver, vulnerable as before. As noted, Sauritch, awkwardly positioned, would not have been situated to readily assist Christner or any clients on the van had the need arose. It is not contended that Sauritch could have prevented Welsh from exiting the van.

Management's greater concern, however, was these employees' failure to report this incident. While the Respondent categorized this incident as ''unusual,'' this occurrence did not rise to the level of unusual incidents is defined in Employer's instructional materials. However, applying a common dictionary meaning, the incident would have to be considered sufficiently distinctive as to come within the reporting requirements for more usual incidents. Given the Employer's demanding responsibility to the clients and its obligation to formally record client care, I find that management was within its legitimate prerogatives in requiring that these employees report the incident and in applying discipline for failure to comply. A defense of not wishing to ''rat'' on a fellow employee was neither adequate nor consistent with a concurrent claim that the employee did not know of the need to report this incident.

As to the Employer's motivation in discharging Christner and Sauritch, under the governing *Wright Line*[34] analysis, the General Counsel first must ''make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have been taken notwithstanding the protected conduct.''

I am satisfied that General Counsel, because of these employees' union activities and the Respondent's knowledge thereof and union animus, has established a prima facie case of discrimination. However, I also conclude that the Respondent has met its burden of showing that the discharges would have occurred even in the absence of union activities. As found above, the Respondent had a legitimate state-driven interest in requiring that its employees formally report unusual incidents affecting clients, including events such as this.[35] The Respondent also was entitled to enforce its policy at the houses and in the vans that an appropriate numerical ratio be maintained between clients and attending staff and that, in the van, the front passenger seat be guarded—particularly when Christner, in the absence of that safeguard, nearly had been choked by a client while driving the van only 2 months before. Christner's actions in allowing Welsh to leave the van while she continued for a time to drive through the park placed both Christner and the clients at risk by upsetting this ratio and by leaving the front passenger seat unattended.

Moreover, the Respondent's subsequent actions in reinstating Christner, but not Sauritch, reflect substantive judgments as to their respective merits as employees rather than retaliation for union activities. Of the two, Christner, whose work record theretofore was unblemished, had been markedly the more active and open union supporter. Yet, in consideration of her prior work history, she was reinstated. On the other hand, Sauritch, who had been disciplined on three occasions in the not-too recent past, penalties which included discharge, suspension, and written reprimands, was not reinstated although his union activities were comparatively marginal. While Emrick seemingly was inconsistent in testifying, in the first instance, that these employees' prior work record had played no role in the initial decisions to terminate them, but later that those records had provided the basis for determining whether to reinstate them, such judgments actually represent two separate concepts. Having determined that these employees had knowingly and seriously violated its above policies, the Respondent, in such circumstances, found that they had engaged in ''gross misconduct'' and discharged them. The Respondent, in thereafter deciding whether to grant leniency, did take their prior records for discipline into account and, as noted, reinstated Christner as the employee with the favorable work history although, as General Counsel emphasizes, the Respondent knew that she had been a principal union activist, certainly in comparison to Sauritch. Accordingly, even in consideration of the Respondent's demonstrated union animus as evidenced by the multiple violations of Section 8(a)(1) of the Act as found above, it is noted that these employees were terminated for knowingly violating significant company policies and that leniency thereafter was applied inversely to their known union activities and sympathies. Therefore, a preponderance of the evidence does support a finding that Christner and Sauritch were disciplined because of their support for the Union and I conclude that Section 8(a)(3) and (1) of the Act was not violated by their treatment.

12. The alleged refusal to bargain

a. *Unit—family day care and food providers*

The Respondent, contrary to the General Counsel, would include within the collective-bargaining unit 14 family day care providers. Of these, five (referred to herein as the FDCPs) provided both food and care in their own homes to children of qualifying parents, placed by and under the Respondent's supervision. The nine others—here termed food providers—provided day care independently of the Respondent but participated in a food program of which the Respondent was the local administrator. Under this program, subsidized meals were served to children in their care.

The FDCP program stemmed from the Respondent's contracts with agencies designated by the State to manage day care programs, such as the Young Women's Christian Association (YWCA) in Allegheny County. The Respondent, in turn, subcontracted with the FDCPs, individuals who were registered with the State to provide day care in their homes for up to six unrelated children. Those subcontracts set the minimum hours of operation per day (6 a.m. to 6 p.m.), the day care must be provided (Monday through Friday) and the

[34] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[35] The record shows that the Respondent had trained its employees, including Christner and Sauritch, in the need to report unusual incidents.

maximum number of days per year for such service (250). They set the rates at which the FDCPs were paid for part-time and full-time care. The Respondent inspected the FDCPs' homes, interviewed them, paid a set price per child/day, received and monitored reports on attendance and meals served, and invoiced the State for payment. The Respondent's family day care coordinator visited each FDCP about every other month, monitored the facilities and food service for compliance with state regulations, and offered some training. The FDCPs providers were expected to attend monthly VCS training programs. The Respondent could terminate the contract with a care provider for the FDCPs' failure to meet the State's or VCS's higher care standards.

The family day care providers maintained their own homes, and the Respondent was not responsible for damage done in a home by a child. The providers could accept or reject a child referred by the Respondent and choose to care for less than the maximum number of children, six, set by the State. For tax purposes, the FDCPs were treated as independent contractors. No deductions were made from the money they received from VCS for taxes or social security. They did not receive health insurance, life insurance, or paid vacations. The Respondent, however, did provide liability insurance. Either the FDCPs or the Respondent could arrange for substitute care while the FDCPs were on vacation.

In addition to the five family day care providers were the nine individuals who cared in their homes for children who had not been placed by the Respondent. These providers, in turn, were not responsible to the Respondent with regard to their child care, having merely participated in a state-run food program locally administered by the Respondent. Actual food purchasing, selection, and preparation was done by the providers who submitted forms indicating the number of meals served and the menu items. The Respondent then reimbursed them with moneys received from the State, the Respondent having been separately compensated for its administrative costs. The food providers were visited less often by the Respondent's family day care coordinator, about three or four times per year. On those visits, the coordinator reviewed the menus, observed the children being served, provided some training, and distributed forms. These providers were welcome at the monthly training programs but were not required to attend.

In *Cardinal McCloskey Services*,[36] the Board applied the right-of-control test[37] to a factual situation so consistent with the instant case that it would be redundant to set forth that matter's details. In *Cardinal McCloskey Services*, it was concluded that the family day care providers were independent contractors rather than employees and, thus, not entitled to the protections of the Act. In fact, the providers in that case were found to be independent contractors notwithstanding that they enjoyed more employer and city-paid benefits (holidays and medical insurance) and were monitored more ''closely and frequently'' than were the Respondent's family day care and food providers. I find that *Cardinal McCloskey Services*, which governs the instant situation, requires that independent contractor status also be found here.[38] Accordingly, it is concluded that the FDCPs and food providers were not the Respondent's statutory employees within the bargaining unit.

b. *Children's learning services*

Valley Child Development Center d/b/a Children's Learning Services (CLS) was a for-profit child day care center that shared space and office facilities and services with the Respondent's not-for-profit child care center in the Cheswick Shopping Center in Cheswick, Pennsylvania. CLS once had been part of the Respondent but, pursuant to certain state requirements, had been split off in 1976. However, since 1986, CLS was managed by the Respondent. Each facility was separately licensed with their own employees and boards of directors. Each served children in identical age groups, providing them with a single-integrated program. Both the staff and the children from the Respondent and CLS were commingled in the programs, with the separate agencies charged according to the number of children from each in a given class. In a single classroom, an aide of one entity might have worked under the direction of a supervising teacher employed by the other. The staffs of both basically had identical compensation and other benefits and worked under identical personnel policies, developed by Deborah Lanzo, the Respondent's western operations director. They shared common lounge, kitchen, and restroom facilities and attended joint training and social functions. While vacation requests were processed separately by each concern, approvals were coordinated to assure proper coverage. On October 1, 4 days after the Union's September 26 claim of majority and demand for recognition, CLS was dissolved and absorbed back into Respondent.

From the above facts, the General Counsel contends that CLS was a separate legal entity when the Union made its demand for recognition and that its employees, at that time, were outside the relevant unit of Respondent's employees. The Respondent, in turn, argues that it and CLS were joint employers whose employees constituted a single integrated bargaining unit. Contrary to the General Counsel, the Respondent would include the CLS employees in any appropriate bargaining unit.

Based upon the foregoing, I conclude that CLS and the Respondent ''exert[ed] significant control over the same employees . . . they share[d] or co-determine[d] those matters governing essential terms and conditions of employment,'' and therefore were joint employers within the meaning of the Act.[39] I further find that the employees in question shared a close community of interest and should be included within the same bargaining unit. Therefore, it is appropriate to in-

[36] 298 NLRB 434 (1990).

[37] See *NLRB v. United Insurance Co*., 390 U.S. 245, 256 (1968), *Air Transit*, 271 NLRB 1108, 1110 (1984), and *News Syndicate Co*., 164 NLRB 422, 423–424 (1967).

[38] In that case, the Board distinguished *Rosemount Center*, 248 NLRB 1322, 1324 (1980), cited by the Respondent to establish that all 14 of the FDCPs and food providers are its employees. The facts in *Rosemount Center* were similar except that, there, the employer exercised greater control over the FDCPs than did either *Cardinal McCloskey Services* or VCS. That employer determined the compensation levels, required the providers to attend weekly training sessions, and limited the number of children the FDCPs could care for to levels lower than otherwise would have been permitted by the District of Columbia.

[39] *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1124 (3d Cir. 1982), enfg. 259 NLRB 148 (1981), citing *Boire v. Greyhound Corp*., 376 U.S. 473 (1964).

clude CLS's employees in the bargaining unit of Respondent's employees.[40]

c. *Unit—individuals alleged to be included in bargaining unit*

1. *James Henry* was a substitute van aide, hired by the Respondent in November 1990. He went on part-time status in April and last worked for VCS in June. At that time, he was told that he was being laid off because of a reduction in the number of children requiring transportation and that he would be recalled if the situation changed. Since then, the transportation program in which he worked was phased out and discontinued.

A laid-off employee may be eligible to vote (or be counted as within the unit for purposes of determining majority) if he or she has a reasonable expectation of recall as of the payroll eligibility period (critical date).[41] Given the length of time that has passed since Henry last worked for VCS and the discontinuation of his previous work, I find that Henry had no reasonable expectation of recall.

2. *Laurel Pyle* was hired by the Respondent in February 1990 as a licensed practical nurse (LPN) on a regular part-time basis. She became a substitute LPN in May 1990 and, on January 20, 1991, requested and was granted a 1-year leave of absence pursuant to the Employer's policy which allowed leaves of absence of that duration. Pyle was terminated on January 31, 1992, because she had not returned when her leave of absence expired.

An employee on sick or maternity leave presumably remains eligible to vote until that presumption is rebutted by an affirmative showing that the employee has resigned or been discharged.[42] Here, on September 26, Pyle was on leave of absence for a fixed period not yet expired. Absent evidence of a change in either the Employer's or the employee's position regarding continued employment, or evidence from the General Counsel whose burden it was[43] to show that the employee's situation was such as to affect her employment status, I believe that a like presumption must be applied. Moreover, an on-call employee who is on leave is entitled to vote if that employee regularly averaged 4 hours per week during the quarter prior to her leave.[44] Noting, too, that the General Counsel has not met the burden of establishing that Pyle did not work with that degree of regularity, I find Laurel Pyle was appropriately included in the bargaining unit when the Union's September 26 demand for recognition was made.

3. *Susan Hudak*, employed by the Respondent on August 30, 1991, as a kindergarten teacher at the Cheswick Center, holds a B.A. degree and was certified in elementary education by the Commonwealth of Pennsylvania. She voluntarily terminated her position on October 1.

General Counsel contends that Hudak's ''voluntary termination'' coincided with the end of the monthly pay period and her employment on September 26, 1991, was in effect ''a serendipitous occurrence.'' Accordingly, General Counsel argues, she should be excluded from the appropriate unit.

Contrary to the General Counsel, the Board has held that even if an employee, prior to a representation election, has given notice of intent to quit her employment at some time shortly after the election, that employee remains eligible to vote if still employed on the date of the election.[45] The same rule pertains to the inclusion within the unit of employees working on the date of a union's demand for recognition. Accordingly, I find that Hudak was within the bargaining unit.

4. *Jack Simak* began his employment with the Respondent in February 1988 as an administrative assistant, acquiring the additional position of personnel manager in September 1989. In 1991, when Simak and Emrick discussed a contemplated Respondent reorganization, he was offered and declined downgrade to a maintenance position. When laid off in June, Simak was told that the Respondent would like to have him in the maintenance position and would be in touch with him. In July, not having found other employment, Simak communicated to the Respondent a willingness to accept the maintenance position, if offered, but was told that budgetary constraints precluded his being hired at that time. Simak's reiterated request for such a position was rejected in August and there has been no further communication between VCS and Simak since that time.

The record does not support the Respondent's contention that Simak ''was subject to recall in a maintenance position'' as of September 26. He had ceased his nonunit employment relationship in June and, even if he could be considered as being on layoff, there was no job opening for him to assume by the September 26 eligibility date. Notwithstanding Emrick's vague assurances that he would be considered for future employment in maintenance, Simak had been permanently laid off from a position outside the bargaining unit, had never been employed in a bargaining unit job and had no reasonable expectancy of being brought back to work in a unit position.[46]

5. *Karen Varrato* began as the Respondent's food service coordinator in 1986 and held the title of director of food services from July 1991 until her termination in April 1992.

[40] Tammy White, Barbara Grabowski, and Michelle Mallonee were employed as teachers' aides by CLS from July 1990 until October 1, 1991. When CLS dissolved on that date, they became employees of VCS. They were within the unit here appropriate. Jennifer Kushner had been employed as a substitute teacher for both entities, but has not worked since January 1991, and had earned less than $50 in that month. Given the infrequency of her work for either entity, her inclusion in the unit would be inappropriate. The Respondent does not appear to contend otherwise.

[41] *Apex Paper Box Co*., 302 NLRB 67, 68 (1991).

[42] *Red Arrow Freight Lines*, 278 NLRB 965 (1986), and cases cited in fn. 4. *Romal Iron Works Corp*., 285 NLRB 1178 fn. 1, 1185–1186 (1987), was cited by the General Counsel for the contrary position. In that case, the judge found that two employees whom the Union contended were on leaves of absence but whom the Employer claimed had been discharged were ineligible to vote in the absence of evidence that they had manifested intention of returning to work. However, reliance on this finding, at 1186, was inappropriate because the Board, at fn. 1, had expressly adopted this finding, pro forma, in the absence of appropriate exceptions.

[43] ''It is the General Counsel's burden to establish the Union's majority status if it seeks a bargaining order remedy predicated on that status.'' *Gourmet Foods*, 270 NLRB 578 fn. 4 (1984).

[44] *Northern California Visiting Nurses Assn*., 299 NLRB 980 (1990); *Sisters of Mercy Health Corp*., 298 NLRB 483 (1990).

[45] *Amoco Oil Corp*., 289 NLRB 280 (1988). In *Amoco*, an employee on terminal leave on the date of the election still was eligible to vote.

[46] *Apex Paper Box Co*., 302 NLRB, supra at 68 fn. 2, and 69 fn. 10 (1991).

She possessed a bachelor's degree in food service management, prepared the menus, did some of the shopping, monitored the use of the client's food stamps, helped and/or filled in for the cook, was responsible for ensuring that the centers met state requirements for food service, and, on the Respondent's behalf, signed the relevant required forms. Varrato also monitored the food service provided by the family day care providers; directed and evaluated the work of the cook and the maintenance man; and had authority to effectively recommend wage increases and discipline, including termination. However, she could not take such actions on her own.

Given Varrato's educational background, her title, and duties, it is clear that she was a member of the management team with supervisory responsibilities, and not within the bargaining unit.

6. *Varity Sipes* was the secretary to the west operations director. In September, she was employed at the Cheswick office on Pillow Avenue where there were no client or client service facilities. Until July, before it was moved, her office had been at the Cheswick Center office. Sipes performed secretarial, receptionist, and other clerical functions, having been trained in automatic data processing and degreed in secretarial and finance work. Sipes helped the cook by sorting and delivering food; with the program manager, she did food purchasing; regularly brought cleaning supplies, blankets, and pillows; and was authorized to bring supplies to the employees in the client service end of the business. A few times per year, when her office was at the Cheswick Center and when that Center was shorthanded, Sipes assisted teachers as an aide. Her contacts with employees engaged in the preschool and residential programs consisted of talking to them to see what was needed and to bring them supplies. At the time of the hearing, Sipes no longer was employed by Respondent.

The Respondent contends that Sipes had substantial contacts with acknowledged unit employees, shared a community of interest with them, and was more like a plant than an office clerical employee. However, I find that it would not be appropriate to include this salaried office clerical employee in a bargaining unit of hourly paid client-serving workers. Sipes was an office clerical employee who had few contacts with the other workers and less with the clients. What connections she did have generally were in the nature of sporadic deliveries which did not involve working with unit employees in any meaningful way. I find no basis for including Sipes in the bargaining unit.

7. *James Brown* and *Debra Lohr* were licensed practical nurses (LPNs).[47] It was stipulated that Brown worked 12 hours in January, 18 hours in February, 10 hours in March, and 10 more hours in July 1991; he has not worked since then. Lohr, it was stipulated, was employed as a substitute LPN in 1991, working 43 hours in January and 12 hours in December, with no hours worked in the intervening months. Neither averaged 4 hours per week in the quarter preceding the date of the Union's September 26 demand. Neither Brown nor Lohr should be included in the unit as of that date.[48]

[47] While these individuals are included among the ''other'' alleged employees on Jt. Exh. 2, the Respondent has not made any arguments in its brief concerning them.

d. *Majority status*

Joint Exhibit 2 contains the names of 132 employees whom the parties agreed should be within the bargaining unit. It also named 14 family day care providers who I have determined fall outside of that unit as independent contractors, and 12 others. I have determined that five of those others, CLS aides White, Grabowski, and Mallonee, LPN Pyle, and Cheswick Center kindergarten teacher Hudak were appropriately included in the unit. Accordingly, I find that the unit consisted of 137 employees on September 26, the date of the Union's demand for recognition.

General Counsel adduced union authorization and/or membership application cards signed by 89 employees. The Respondent, while generally denying the propriety of relying on authorization cards to prove majority status,[49] has disputed 16 of these cards. Even assuming, arguendo, the validity of Respondent's 16 challenges, the Union still would have majority status with signed authorization cards from 73 of 137 unit employees. Virtually all the cards were signed between mid-August and mid-September.

However, for completeness, I shall treat with the 16 challenged cards. The Respondent challenged six cards, those purportedly signed by employees Tracey Keill, Cynthia Macko, Carol Maloy, Melody Sechrengost, Mack Skaggs, and Sherri Zelmore, on the ground that they had been inadequately authenticated by Union Business Representative John Haer. Haer testified that these cards had been signed at an August 12 meeting he had conducted with the Respondent's employees. Although Haer had not known all employees personally prior to the meeting and had not specifically witnessed the various acts of card signing, he had seen employees apparently sign their cards and pass them back to him, singly and in group. Haer's information as to who had been at the meeting and who had signed cards came by reference to the attendance roster for that session. The cards of Keill and Macko were challenged for the additional reason that these employees only had signed the authorizations for payroll deduction but had failed to sign the applications for membership and authorizations for representation.[50]

Authorization cards may be sufficiently authenticated through the testimony of the union representative who had conducted the meeting at which they were signed, where he saw cards signed and where the cards were returned to him by the signers, particularly where the signatures corresponded to the names of employees who had attended the meeting, as shown on the attendance roster.[51] The signed payroll deduction authorizations of Keill, Macko, and Sechrengost also may be considered in determining the Union's majority sta-

[48] *Northern California Visiting Nurses Assn.*, supra; *Sisters of Mercy Health Corp.*, supra.

[49] The cards unambiguously authorized the Union to represent the signers as their collective-bargaining representative. *Cumberland Shoe Corp.*, 144 NLRB 1268, 1269 (1963).

[50] A third individual in this group, Sechrengost, had signed an authorization for payroll deduction but had failed to sign her last name on the application for membership.

[51] *NLRB v. General Wood Preserving Co.*, 905 F.2d 803, 810–813 (4th Cir. 1990), enfg. 288 NLRB 956 (1988).

tus as the Board long has held that implicit in the signing of a dues-deduction authorization is authorization for representation.[52]

The Respondent challenged the cards of Rae Barron, Diana Hileman, Larry Rice, and Linda ''Lesnowski'' on the ground that on September 26 they no longer were employees. As argued by the Respondent, the names of Barron, Diana (or ''D.'') Hileman, and Rice were not listed on Joint Exhibit 2 as among those whom the parties had stipulated to be employees on that date and they, therefore, must be excluded. The name of Linda *Lesnioski*, however, was included on that list and her card was among those submitted by the General Counsel. Accordingly, Lesnioski's card should be included in determining the Union's majority status.

The Respondent would exclude the authorization cards signed by Rocco Sciore and Nina Stepoli on the ground that both were registered nurses (RNs) on September 26. The record supports the Respondent's contention with respect to Sciore. Stepoli's card, authenticated by Christner, was received in evidence over Respondent's objection with the understanding that her status, undescribed in the record, would be resolved. The parties did not revisit this issue and Stepoli was not on the Joint Exhibit 2 listing of unit employees. On that basis, I conclude that General Counsel has failed to establish that Stepoli was a unit employee.

The Respondent correctly challenged the authorization cards of Michele Pushkarich and Donna Sleasman on the ground that the cards were signed on November 18 and December 20, respectively, after the September 26 demand date. Since cards executed after the demand date cannot be used to establish majority status as of that date, the Respondent's challenges to the cards of Pushkarich and Sleasman are sustained.

The Respondent contends that Mary Joe Dalasio's card should not be counted in determining the Union's majority status as of September 26 because she had given notice of her intention to quit her job at the end of September. This is the obverse of the General Counsel's above argument against counting the card of Susan Hudak who had voluntarily terminated her employment on October 1. As in the case of Hudak, Dalasio must be included in the unit on the critical date.[53]

Patrick Sauritch testified that he had authorized his brother to sign an authorization card on his behalf and his card was introduced through that brother, Michael. Patrick Sauritch's testimony conflicted with a pretrial affidavit wherein he had sworn that he had signed the card himself. He explained that when he gave that affidavit he was unsure of whether an authorization to another person to sign the card was proper. In fact, there is no impropriety in such an authorization[54] and the Board previously accepted a card under virtually identical circumstances.[55] I find Patrick Sauritch's explanation to be credible and conclude that his card should be counted in determining of the Union's majority status.

From the foregoing, I conclude that on September 26, when it demanded recognition, the Union possessed valid authorizations for representation from 82 of 137 unit employees, a clear majority.[56] In so finding, the above unit description alleged as appropriate by the General Counsel is left unchanged, except that it now also should include kindergarten teachers by virtue of former employee Susan Hudak's inclusion within the unit on September 26.

e. *Applicability of a bargaining order*

In *NLRB v. Gissel Packing Co*.,[57] the Supreme Court held that authorization cards, ''though admittedly inferior to the election process, can adequately reflect employee sentiment when that process has been impeded.'' The Court further

[52] *Grey's Colonial Boarding Home*, 287 NLRB 877 (1987), quoting *Lebanon Steel Foundry*, 33 NLRB 233, 239 (1941), enfd. 130 F.2d 404 (D.C. Cir. 1942), cert. denied 317 U.S. 659 (1942).

[53] *Amoco Oil Corp*., supra.

[54] *La Mousse, Inc*., 259 NLRB 37, 42 fn. 10 (1981).

[55] *Limpert Bros*., 276 NLRB 364, 370 (1985) (card of Carmen Rodriguez).

[56] Before closing the hearing in this matter, pursuant to the parties' stipulation, I left the record open solely to receive specific data contained in the Respondent's payroll records relating to four employees, Barbara Grabowski, Michelle Mallonee, Tammy White, and Jennifer Kushner, who, on September 26, had been employed as aides by CLS. This was to enable introduction of further evidence concerning the unit placement of these four individuals. Jt. Exh. 2 which, as noted, listed 132 employees whom the parties stipulated were in the unit, also identified all employees in other categories whose status within the unit was in dispute, including the four above-named individuals. However, after the hearing the Respondent filed a motion for a more specific stipulation wherein, over the General Counsel's objection, he sought to expand my stipulation-based ruling that payroll information concerning the four be subsequently received by submitting, as proffered R. Exh. 24, analogous payroll data for a list of 28 employees on CLS' payroll as of September 26. Those included in this enlarged list previously had not been identified except that three of the above four employees who had been the subject of my ruling also were included among the 28 in Respondent's motion. While it is undisputed that the remaining 25 were on the CLS payroll on September 26, and received the remunerations indicated, there is no showing as to the capacities in which these individuals were employed, where they were employed, their duties or other information relevant to their unit placement. Also, the Respondent's proffered exhibit reveals that 4 of these 25, unlike virtually all the hourly rated unit employees, were salaried. The payroll data concerning the four employees covered by the original ruling, Grabowski, Mallonee, White, and Rushner, has been received and considered above. As stated by the General Counsel in opposition to the Respondent's motion, it much exceeds the specific and limited purpose for which the parties had agreed to hold open the record, and attempts to do so without established basis. As the General Counsel indicates, Sec. 102.48(d)(1) of the Board's Regulations provides that a motion to reopen the record, which the Respondent in effect now seeks to do, must be based on newly discovered evidence or evidence which has become available only since the close of the hearing. Here, the Respondent's newly offered evidence is drawn from the Respondent's own business records within its possession and control and is neither newly discovered nor previously unavailable. The General Counsel also correctly further points out that receipt of the Respondent's proffered evidence would be a posthearing derogation of the parties' stipulation underlying Jt. Exh. 2 which contained the names of those employees whom the parties agreed were in the unit and all the additional employees whose unit placement was in dispute. The exhibit defined the outer parameters of the unit. The Respondent's failure to mention or seek to include these additional 25 ''employees'' at the hearing also serves to preclude that party from so doing after the hearing has closed. For the above reasons, the Respondent's motion for a more specific stipulation is denied and the R. Exh. 24 in support thereof is placed in the rejected exhibit file.

[57] 395 U.S. 576, 603 (1969).

stated that it is appropriate to rely on such cards to establish union majority status cases.[58] It, beyond question, would be proper to grant bargaining orders based upon a card majority ''in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices,'' where the unfair labor practices are of ''such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had.''

The second category approved by the Court were those ''less extraordinary cases marked by less pervasive practices'' which nonetheless still tended to undermine majority strength and impede the election processes. In such cases, the Court said:

> the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

The Court went on to:

> emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order.

It is necessary to here determine in which of the *Gissel* categories the immediate case falls. There are no per se rules as to when the commission of unfair labor practices will result in an 8(a)(5) violation.[59]

I have found above that three instances of interrogation had occurred—two in August and one in late September—only one of which was committed above the first level of supervision. I have determined that a midlevel supervisor, Geary, had placed an unduly broad and discriminatory restriction on solicitations or union discussions upon a nonunit employee, Sciore. I have concluded that, in mid-August, a low-level supervisor, McClain, had told a single employee that selection of the Union would be futile and that several threats were uttered. McCarthy, a high-level supervisor, was overheard by one employee telling another supervisor to uncover and discharge union supporters. He also told employees at one of the houses, in mid-October, that selection of the Union would cause the Employer to close or declare bankruptcy. At another house, he merely referred to the possibility of bankruptcy in the event of a strike, without threatening to close.[60] McClain, I found, made a similar threat of bankruptcy and/or closing and also threatened that with the presence of a union, things would get rougher. These unfair labor practices occurred in, or were directed at, the employees who worked at only 4 of Respondent's approximately 15 facilities. Although there is some evidence that the alleged unfair labor practices were discussed among the employees of the various facilities at the union meetings, they directly affected, at most, between 20 and 30 of Respondent's 137 unit employees. I have recommended dismissal of the remaining 8(a)(1) and all the 8(a)(3) allegations.

Without underestimating the seriousness of the above-described conduct, it is obvious that the Respondent's unfair labor practices do not reach the first category under *Gissel*, that of outrageous and pervasive conduct such as is found only in exceptional cases. The question is where in the spectrum between categories two and three does this case fall.

In *Horizon Air Services*,[61] the Board adopted the Second Circuit's characterization of certain unfair labor practices as ''hallmark'' violations, the presence of which would ''support the issuance of a bargaining order unless some other mitigating circumstances exist.''[62] Those hallmark violations include plant closures, discrimination, and grants of benefit as well as threats of adverse action. Such serious conduct, often representing completed actions as distinguished from ''mere statements, interrogations or promises,'' may justify a finding that Section 8(a)(5) of the Act had been violated without extensive explication as to lasting inhibitive effect upon the work force.

Here, the proven unfair labor practices include two that approach hallmark status, i.e., the threats of business closure attributed to McCarthy and McClain. None of the unfair labor practices, however, reached the level of completed coercive action such as discriminatory discharge or a grant of benefit. Noting that these unfair labor practices merely involved oral communications that directly reached but a small percentage of the nearly 140 unit employees[63] in but a few of the Respondent's widely spread facilities; were (with respect to the alleged hallmark violations) supported by the testimony of very few of the General Counsel's witnesses notwithstanding that presumably all of them attended the meetings where the videos were shown and where McCarthy had spoken; were committed primarily by low- or mid-level supervisors and not at all by the highest level of management (Emrick), I am constrained to conclude that this case falls within the third *Gissel* category. Unlike those cases wherein the Board has found the possibility of a fair election to have been precluded, this case presents a situation of less extensive unfair labor practices, that would not so affect the electoral process as to preclude its efficiency. In these circumstances, a bargaining order would not be appropriate.[64]

[58] Id. at 614–615.

[59] *Uniontown Hospital Assn.*, 277 NLRB 1298, 1300 (1985).

[60] Bankruptcy and closure of business are sometimes, but not always, synonymous.

[61] 272 NLRB 243 (1984).

[62] *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980).

[63] *M. O'Neil Co.*, 211 NLRB 150, 152 (1974).

[64] Compare *Uniontown Hospital Assn.*, supra (where the employer's supervisors, at all levels, committed numerous unfair labor practices, albeit none at the hallmark level, and where no bargaining order was deemed warranted) and *Chosun Daily News*, 303 NLRB 901, 905 (1991) (where a bargaining order was found warranted in view of numerous unfair labor practices committed by management at the highest levels, including discriminatory reductions in hours; threats to close; and grants of benefits to all the employees in a small unit where all worked in close proximity). See also *International Door*, 303 NLRB 582 (1991), where numerous hallmark violations committed by the highest corporate officers, directed at all

Continued

From the foregoing, I find that the Board's traditional remedies will make probable a free and unimpaired election. The record does not indicate a likelihood that the Respondent will commit additional unfair labor practices should the employees or this, or any other union, undertake another organizational campaign. Accordingly, I shall recommend dismissal of the allegation that the Respondent violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. Valley Special Needs Program, Inc., t/a Valley Community Services, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Service Employees International Union, Local 585, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees concerning their union activities, sympathies, and desires; by threatening its employees with closing of its facilities and/or with declaration of bankruptcy, with discharge, and other unspecified reprisals because of their union activities and sympathies; by imposing an overly broad and discriminatory restriction on union activities and discussions on company property and by telling employees that selection of the Union would be futile, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Except as found hereinabove, the Respondent has not engaged in unfair labor practices alleged in the consolidated complaint.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[65]

ORDER

The Respondent, Valley Special Needs Program, Inc., t/a Valley Community Services, with facilities in the Pennsylvania counties of Allegheny, Westmoreland, Butler, and Somerset, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union activities, sympathies, and desires; threatening its employees with closure of its facilities and/or with declaration of bankruptcy, with discharge and other unspecified reprisals because of their union activities and sympathies; imposing overly broad and discriminatory restrictions on union activities and discussions on company property; and telling employees that it would be futile to select Service Employees International Union, Local 585, AFL–CIO, as their bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facilities in the Pennsylvania counties of Allegheny, Westmoreland, Butler and Somerset, copies of the attached notice marked ''Appendix.''[66] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) IT IS FURTHER ORDERED that the consolidated complaint herein be dismissed insofar as it alleges violations of the Act not specifically found herein.

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the employees in a small unit, were held to warrant a bargaining order remedy.

[65] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[66] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''